

FILED

DISTRICT COURT OF GUAM

MAR 16 2005

MARY L.M. MORAN
CLERK OF COURT

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DISTRICT COURT OF GUAM

TERRITORY OF GUAM

JULIE BABAUTA SANTOS, Individually
and on behalf of all those similarly situated,

Plaintiff,

vs.

FELIX CAMACHO, Governor of Guam,
ART ILAGAN, Director of Department of
Revenue and Taxation, LOURDES M.
PEREZ, Director of Department of
Administration, and GOVERNMENT OF
GUAM,

Defendants.

Civil Case No. 04-00006

**OPPOSITION TO PETITIONER AND
RESPONDENT'S MOTION TO
STRIKE ENTRY OF APPEARANCE
BY CHRISTINA M.S. NAPUTI AND
MARY GRACE SIMPAO**

*** * OPPOSITION TO MOTION TO STRIKE ENTRY OF APPEARANCE * ***

COME NOW class members Christina M.S. Naputi and Mary Grace Simpao (hereinafter "Naputi and Simpao") through their counsel VAN DE VELD SHIMIZU CANTO & FISHER and TOUSLEY BRAIN STEPHENS PLLC, by James L. Canto II, Esq., to oppose "Petitioner's Motion To Strike Entry of Appearance By Christina M.S. Naputi And Mary Grace Simpao" (hereinafter "Petitioner's Motion to Strike") and "Memorandum Of Points And Authorities In Support Of Petitioner's Motion To Strike Entry of Appearance By Christina

1 M.S. Naputi And Mary Grace Simpao" (hereinafter "Petitioner's MPOA") both filed on March
2 2, 2005 by Petitioner Julie Babauta Santos (hereinafter "Petitioner"). By this document, Naputi
3 and Simpao additionally oppose "Respondent Government of Guam's Joinder In Petitioner's
4 Motion To Strike Entry Of Appearance By Christina M.S. Naputi And Mary Grace Simpao"
5 (hereinafter "Respondent's Joinder"), filed March 4, 2005. Naputi and Simpao submit this
6 opposition to this Court pursuant to FRCP Rules 7, 8, and 11, and District Court of Guam Local
7 Court Rules LR 7.1 and LR 23.1. This opposition is supported by the following memorandum
8 of points and authorities, the documents and pleadings on file, and such other further evidence
9 as the Court may permit these parties to submit at the hearing of this objection and motion.
10

11 * * **MEMORANDUM OF POINTS AND AUTHORITIES** * *

12
13 **Entry Of Appearance By Naputi And Simpao Is Proper And Should Not Be Stricken.**

14 Petitioner moves to strike the entry of appearance by Naputi and Simpao as class
15 members from District Court of Guam Civil Case No. 04-00006 (the "Santos Action"), which
16 Naputi and Simpao made for the record through their "Representation Statement and Entry Of
17 Appearance" filed February 3, 2005. Neither Petitioner nor Respondent presents any legal
18 authority to support their contention this Court should strike the entry of appearance by Naputi
19 and Simpao.

20 The entry of appearance in this case is legally supported by Federal Rule of Civil
21 Procedure (FRCP) Rule 23(c)(2)(B), which states in part: "[A] class member may enter an
22 appearance through counsel if the member so desires, [and] that the court will exclude from the
23 class any member who requests exclusion, stating when and how members may elect to be
24 excluded ..." Naputi and Simpao have never requested exclusion (opt-out) from the class and,
25 to the contrary, their filed Representation Statement and Entry of Appearance expresses their
26 intent to remain and participate in the proceedings. Petitioner implies that filing a separate
lawsuit is a request to be excluded from the class in the Santos Action, yet Petitioner provides

1 no legal precedent for her arbitrary characterization. On the other hand, courts have long held
2 “the existence of ... [an independent action] d[oes] not automatically exclude plaintiffs as
3 potential members of the class. The exclusion could only be effected by compliance with the
4 provisions of Rule 23(c)(2)(B).” *Supermarkets General Corp. v. Grinnel Corp.*, 59 F.R.D. 512,
5 513 (S.D.N.Y. 1973). As defined by Petitioner’s Class Action Complaint in the Santos Action,
6 Naputi and Simpao are class members of this class action and, regardless of the disposition of
7 any other lawsuit, Naputi and Simpao will be bound by any judgment in the Santos Action as
8 class members. In fact, Petitioner acknowledges that Naputi and Simpao have not opted out of
9 the Santos Action class, alleging they are currently acting “in anticipation of opting out ...”
10 Petitioner’s MPOA, p.4, ln.3.

11 Petitioner argues that by allowing the appearance of Naputi and Simpao, this Court
12 would be permitting them to exercise rights of both opt-in and opt-out class members.
13 Petitioner’s MPOA, p.4, lns.2-6. However, this Court has not approved any current notice to
14 class members pursuant to FRCP Rule 23(c)(2)(B), required to inform Naputi and Simpao of
15 their rights to opt out of the class and their method for doing so. Naputi and Simpao cannot
16 have opted out if the Court has not yet ordered the notice “stating when and how members may
17 [prospectively] elect to be excluded” per FRCP Rule 23(c)(2)(B) . The Court could not be
18 permitting Naputi and Simpao to exercise the rights of opt-out class members since it has not
19 yet established what those rights are, and more importantly it has not yet created the
20 opportunity for one to even become an opt-out class member.

21 This Court has already condoned by anticipation the actions of Naputi and Simpao in
22 entering their appearance to possibly file objections to the Settlement Agreement. Order, J.
23 Coughenour, p.9, lns.4-8, August 5, 2004. Petitioner misrepresents the language of Naputi and
24 Simpao’s First Amended Complaint that recites this Court’s order, by injecting an exclusive
25 reading of the word “or” (*i.e.*, to participate as objectors or file a parallel action). Petitioner’s
26 MPOA, p.3, lns.17-24. To the contrary, this Court actually stated: “[T]here are other means of

1 protecting their interests (such as by opting out, filing objections to the Settlement Agreement,
2 and/or filing a separate law suit)." Order, p.9, lns.6-8. Judge Coughenour offered all of the
3 foregoing as appropriate actions by Naputi and Simpao, and did not restrict any of the choices
4 to be exclusive of each other.

5 Naputi and Simpao properly maintain their appearance through counsel in the Santos
6 Action pursuant to Federal Rule of Civil Procedure (FRCP) Rule 23(c)(2)(B). Naputi and
7 Simpao have never requested exclusion from the class and continue to be putative class
8 members of this class action, bound by any class judgment. Moreover, this Court has not
9 approved any current notice to class members pursuant to FRCP Rule 23(c)(2)(B), necessary to
10 inform all class members of their rights and requirements to opt out of the class. Thus Naputi
11 and Simpao cannot have possibly opted out because that option is yet unripe. Furthermore, this
12 Court, through Judge Coughenour, did not foreclose the possibility of Naputi and Simpao's
13 current posture amidst the appropriate options given. Certainly Petitioner and Respondent offer
14 no basis in controlling or persuasive law as to why this Court should strike the appearance of
15 Naputi and Simpao from the Santos Action. For the foregoing reasons, Naputi and Simpao
16 respectfully request this Court deny Petitioner's and Respondent's joint Motion to Strike Entry
17 of Appearance.

18
19 DATED this 16th day of March, 2005.

20 VAN DE VELD SHIMIZU CANTO & FISHER
21 TOUSLEY BRAIN STEPHENS PLLC

22
23 By: 
24 James L. Canto II
25 Attorneys for Plaintiffs
26

CERTIFICATE OF SERVICE

I, JAMES L. CANTO II, certify that I caused a copy of the foregoing document here filed to be served on the following individuals or entities on March 16, 2005, via hand delivery at the following addresses:

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Respectfully submitted this MARCH 16, 2005

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